IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v.

CR NO. 15-205 JCH

RAYMOND CASTILLO, a.k.a., "Crook,"
DANIEL MAESTAS, a.k.a., "Cartoon,"
JOHNNY RAMIREZ, a.k.a., "Lil Killer,"
FRANK GALLEGOS, a.k.a., "Chango,"
REYES LUJAN, a.k.a., "Kings," and
HENRY LUJAN, a.k.a., "Lil Villian,"
REYNALDO MARQUEZ

Defendants,

MR. LUJAN'S MOTION TO RECONSIDER COURT RULING ON MOTION TO DISMISS HOBBS ACT COUNT (DOC. 313) AND MEMORANDA

COMES NOW Defendant Henry Lujan, by his court-appointed attorney, John F. Moon Samore, Esq., pursuant to the Rules, for his Motion and Reconsider Court Ruling on Motion to Dismiss Hobbs Act Count (Doc. 313), to STATE:

STATEMENT OF CASE

Mr. Lujan is scheduled to go to trial on four counts arising from the Third Superseding Indictment (Doc. 21) on August 15. He apparently will be the final remaining defendant of the seven defendants who are being charged in this indictment. On May 2, 2016, the Court issued a memorandum opinion regarding a Motion to Dismiss (Doc. 257), in which Mr. Lujan joined (Doc. 258). The Court's Ruling denied Mr. Castillo's Motion to Dismiss the Hobbs Act Count Seven but withheld ruling as to remedy on Count Three, which is the Count against Mr. Lujan.

The Government noticed that it would voluntarily (Doc. 314) supersede the indictment, sensibly in order to reduce appellate issues.

STATEMENT OF FACTS

The Court's "factual and procedural background," included (pp. 2-6) in its Memorandum Opinion and Order (Doc. 113) serves sufficiently to describe the state of the factual record at the time the Opinion was issued, and, for purposes of this Motion to reconsider, is adopted in entirety, except for additional information offered herein.

This Motion to Reconsider is based upon the Court's interpretations of the Defendants' argument that the categorical approach should be applied to interpreting crime of violence. This Court used a modified categorical approach in its ruling, concluding that, if "robbery" is a crime of violence, then an aider and abetter to a robbery would also be guilty of an 18 USC §924(c) violation.

LEGAL ARGUMENT

Defendant Henry Lujan was charged by Indictment, Superseding Indictment, and Third Superseding Indictment (Docs. 17, 86, and 321) of three counts: (1) Count 1: Conspiracy, 18 U.S.C. § 1951(a); (2) Count 2: Aiding and Abetting in Interference with Interstate Commerce by Robbery and Violence, 18 U.S.C. §§ 2 and 1951(a); and (3) Count 5: Aiding and Abetting in the Use, Carry, and Possession of a Firearm During and in Relation to a Crime of Violence, 18 U.S.C. §§ 2 and 924(c). On December 14, 2015, Defendant Raymond Castillo filed a Motion to Dismiss Count 3 which Defendant Henry Lujan joined. Docs. 257 and 258. The Court has correctly construed Defendant Henry Lujan's motion to join as a motion to dismiss Count 5 on the same grounds as Defendant Castillo moves to dismiss Count 3. Doc. 313, n.1. The Court entered a Memorandum Opinion and Order (Doc. 313) on May 2, 2016.

In the Memorandum Opinion and Order, the Court accurately notes that Defendant Henry Lujan is charged in Count 1 with conspiracy to interfere with commerce by robbery in violation of 18 U.S.C. §1951(a) arising from the October 29, 2014 Wal-Mart robbery and charged in Count 5 with "knowingly aided and abetted the use and carrying of a firearm during and in relation to a crime of violence for which the defendants may be prosecuted in a court of the United States: to wit, conspiracy, as charged in Count [1] of this indictment, and interference with interstate robbery as charged in Count 2 of this indictment."

The Court correctly concluded that Count 1, the Conspiracy to Commit Hobbs Act Robbery is not a crime of violence under the terms of either 18 U.S.C. § 924(c)(3)(A) or (B). However, the Court relied on the United States Supreme Court decision of United States v. Castleman, 134 S. Ct. 1405 (2015) to conclude that Hobbs Act Robbery is a crime of violence under 18 U.S.C. § 924(c)(3)(A), the force clause. Defendant Lujan respectfully requests the Court reconsider its ruling that Hobbs Act Robbery is a crime of violence in light of Voisine v. United States, 136 S. Ct. 2272 (2016).

Even if the Court reaches the same conclusion, that Hobbs Act Robbery is a crime of violence; such a conclusion is not determinative of Mr. Lujan's Johnson challenge. Mr. Lujan is charged with Aiding and Abetting a Hobbs Act Robbery, not commission of the Hobbs Act Robbery as the principle. This distinction is critical to the analysis. As a result, Mr. Lujan respectfully requests the Court reconsider its Memorandum Opinion (Doc. 313). It is Mr. Lujan's contention that Aiding and Abetting, like Conspiracy, is not a crime of violence.

APPLICATION OF AUTHORITIES

I. Defining Section 924(c)'s "Use of Force" Clause

Determination of "[w]hether a crime fits the §924(c) definition of a 'crime of violence' is a question of law" and that "answer requires examination of the legal elements of the crime, not an exploration of the underlying facts." United States v. Morgan, 748 F.3d 1024, 1034 (10th Cir. 2014)(citing Leocal v. Ashcroft, 543 U.S. 1, 7 (2004)). Section 924(c)(3)(A) defines "crime of violence" as a felony that has an element "the use, attempted use, or threatened use of physical force." 18 U.S.C. §924(c)(3)(A). This Court has correctly determined that application of the categorical approach is appropriate in this determination pretrial. See Doc. 31 at 7, n.2 (noting the government's concession and the language in United States v. Serafin, 562 F.3d 1105, 1107-08)(10th Cir. 2009)).

The Court has defined "threat" as a "communicated intent to inflict physical or other harm on any person or on property" and interpreted that to mean "an avowed present determination or intent to injure presently or in the future." Doc. 313 at 7-8 (citing Black's Law Dictionary 1480 (6th ed. 1990)). The Court ruled: "Consequently, as a temporal matter, the 'threatened use of physical force' crime-of-violence element encompasses the Hobbs Act Robbery taking by means of a 'fear of injury' in the 'future,' as well as 'immediate[ly].'" Id.

However, the United States Supreme Court defined the term "physical force" in the context of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. §924(e), as "violent force," or "force capable of causing physical pain or injury to another person." Johnson v. United States, 559 U.S. 133, 140 (2010)(the term "physical" refers to force "exerted by and through concrete bodies" – distinguishing physical force from "intellectual force or emotional force."). Mr. Lujan contends the 2010 Johnson definition of "physical force" as used in the context of the ACCA is correctly applied to "physical force" as used in 18 U.S.C. §924(c).

This argument was rejected by the Court. See Doc. 313 at 8-13. The Court, relying on the analysis in United States v. Castleman, ruled that the "Hobbs Act fear is that of 'injury' to his or her 'person or property'" and concludes "[t]he force necessary to cause an injury to the body or property of another is of a greater degree than the minimal or slightest unwelcome touching that could constitute an assault under the Florida statute at issue in Johnson." Doc. 313 at 8-9 (reasoning, "Even assuming Johnson's standard applies to § 924(c)(3), this Court is unconvinced Johnson created such a heightened threshold for the necessary amount of force to preclude Hobbs Act robbery categorically as a crime of violence. Johnson recognized the strong force requires more than slight touching.").

Mr. Lujan asks the Court to reconsider its application of Castleman to the question at bar in light of the recent United States Supreme Court decision in Voisine v. United States, 136 S. Ct. 2272 (2016). In Castleman, the Supreme Court concluded that Johnson v. United States, 559 U.S. 133 (2010)(hereinafter the "2010 Johnson decision"), requires the common-law meaning of "force" be attributed to §921(a)(33)(A)'s definition of a "misdemeanor crime of domestic violence" as an offense that "has, as an element, the use or attempted use of physical force." 134 S. Ct. at 1413. In doing so, the Supreme Court held that the requirement of "physical force" is satisfied, *for purposes of §922(g)(9)*, by the degree of force that supports a common-law battery conviction." Id. (emphasis added). The Supreme Court's most recent Voisine decision made clear that application of this common-law meaning of "force" to §922(a)(33)(A)'s definition of "misdemeanor crime of domestic violence" is limited to that purpose:

> Like Leocal, our decision today concerning § 921(a)(33)(A)'s scope does not resolve whether § 16 includes reckless behavior. Courts have sometimes given those two statutory definitions divergent readings in light of differences in their contexts and purposes, and we do not foreclose that possibility with respect to their required mental states. Cf. United States v. Castleman, 572 U.S. ___, ___, n.4, 134 S. Ct. 1405, 1411, n.6, 188 L.Ed.2d 426 (2014)(interpreting "force" in § 921(a)(33)(A) to encompass any offensive touching, while acknowledging that federal appeal courts have usually read the same term in § 16 to reach only "violent force"). All we say here is that Leocal's exclusion of accidental conduct from a definition hinging on the "use" of force is in no way inconsistent with our inclusion of reckless conduct in a similarly worded provision.

Voisine, 136 S. Ct. at 2280, n.4.

In Castleman, the Supreme Court pointed to the three reasons supporting the 2010 Johnson rejection of the common-law definition of "force" for purposes of defining the ACCA's "violent felony" and the Castleman decision to embrace the common-law definition of "force" in defining § 921(a)(33)(A)'s "misdemeanor crime of domestic violence." 134 S. Ct. at 1410-1411. First, reasoned the Supreme Court, perpetrators of domestic violence were "routinely prosecuted under applicable assault or battery laws" at the time Congress enacted § 921(a)(33)(A), "it was likely that Congress meant to incorporate that misdemeanor-specific meaning of "force" in defining a "misdemeanor crime of domestic violence." Id., 134 S. Ct. at 1411. Second, the word "violent" or "violence", although standing alone "connotes a substantial degree of force," the term "domestic violence" "is not merely a type of 'violence'; it is a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context." Id. Third, section 922(g) "groups those convicted of 'misdemeanor crimes of domestic violence' with others whose conduct does not warrant such a designation." Id., 134 S. Ct. at 1412. The Supreme Court pointed out that in Johnson, "a determination that the defendant's crime was a "violent felony" would have classified him as an "armed career criminal". Id. Thus, the Supreme Court has very clear reasons for distinguishing the application of the common-law definition of "force" to the "misdemeanor crime of domestic violence" as used in § 922(g) and those reasons clearly call for this Court to reject the common-law definition of "force" for purposes of defining the § 924(c)'s "crime of violence" just as the Supreme Court rejected that definition for purposes of the ACCA's "violent felony".

The common-law definition of "force" cannot be applied to § 924(c)(3)'s "crime of violence". First, Congress did not intend to incorporate misdemeanor-specific meaning of "force" in defining a "crime of violence." The term, "crime of violence" used in § 924(c)(3) requires that the offense be *a felony*. This is distinguishable from the requirement that the "misdemeanor crime of domestic violence" be "an offense". Second, the term "crime of violence" as used in § 924(c)(3), is not a term of art encompassing acts that are characterized as "violent" in certain contexts but not others (i.e., nondomestic); rather it is a term requiring a determination of whether a felony offense has the necessarily required type of "violence." Thus, § 924(c)(3) is much more akin to 18 U.S.C. §§ 16 and 924(e). Third, section 924(c)(3) does not group those convicted of "crimes of violence" with others whose conduct does not warrant such a designation. Section 924(c)(3) does not function in this manner. Rather, like the ACCA, section 924(c)(3) requires a determination that the defendant's crime is a "crime of violence" in order to impose the sentencing enhancement of §924(c).

II. Aiding and Abetting a Hobbs Act Robbery

Even if, after reconsidering its reliance on Castleman, the Court determines that Hobbs Act Robbery satisfies the required use of force to be deemed a "crime of violence", that determination is not decisive of Mr. Lujan's Johnson challenge that Aiding and Abetting a Hobbs Act Robbery is not a "crime of violence."

Section 2 of Title 18, aiding and abetting, provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principle.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principle.

18 U.S.C. § 2. The Tenth Circuit Uniform Jury Instruction 2.06 (2015) provides the following elements must be proven by the government beyond a reasonable doubt for the crime of aiding and abetting a violation of 18 U.S.C. §2:

> *First*: someone else committed the charged crime, and
>
> *Second*: the defendant intentionally associated himself in some way with the crime and intentionally participated in it as he would in something he wished to bring about. This means that the government must prove that the defendant consciously shared the other person's knowledge of the underlying criminal act and intended to help him.

10th Cir. UJI, 2.06 (2015). "In proscribing aiding and abetting, Congress used language that 'comprehends all assistance rendered by words, acts, encouragement, support, or presence'— even if that aid relates to only one (or some) of a crime's phases or elements." Rosemond v. United States, 134 S. Ct. 1240, 1246-47 (2014)(omitting internal citations).

This Court provided an in-depth analysis as to whether Conspiracy to Commit Hobbs Act Robbery satisfies the definition of both the force clause, § 924(c)(3)(A), and the residual clause, § 924(c)(3)(B). Ultimately, the Court correctly ruled that Conspiracy to Commit Hobbs Act Robbery does not satisfy either the residual clause nor the force clause of § 924(c)(3)'s "crime of violence" definition. The Tenth Circuit has not decided the issue of whether Aiding and

Abetting a Hobbs Act Robbery is a "crime of violence", however, the analysis employed by this Court as to Conspiracy to Commit Hobbs Act Robbery is instructive.

A. Aiding and Abetting a Hobbs Act Robbery Does Not Satisfy Force Clause

Defense counsel could find no Tenth Circuit or United States Supreme Court case deciding whether Aiding and Abetting a Hobbs Act Robbery is a "crime of violence." The Eleventh Circuit recently issued an opinion holding that a companion conviction for Aiding and Abetting a Hobbs Act robbery is a "crime of violence" under the use-of-force clause, § 924 (c)(3)(A), in In re Colon, ---F.3d ---, 2016 WL 3461009 (11th Cir. June 24, 2016). The Eleventh Circuit concluded Aiding and Abetting a Hobbs Act Robbery is a "crime of violence" based solely on an extension of the principle that "[a] person who 'aids, abets, counsels, commands, induces or procures' the commission of an offense 'is punishable as a principle.'" Id., 2016 WL 3461009 at *3. This logic, however, neglects to address the holding in the 2010 Johnson decision and ignores required proof of elements under 18 U.S.C. §2 which differs significantly from the elements of proof required as to the principle's commission of Hobbs Act Robbery.

This logic is also contrary to the purpose of 18 U.S.C. § 924(c) to "punish the choice to use or possess a firearm in committing a predicate offense, in addition to the punishment otherwise imposed for the predicate crimes." United States v. Cureton, 739 F.3d 1032, 1045 (7th Cir. 2014)(interpreting the unit of prosecution under 18 U.S.C. §924(c)); see also United States v. Phipps, 319 F.3d 177, 187 (5th Cir. 2003)(applying the rule of lenity in the unit of prosecution contemplated under §924 due to the statute's ambiguity while noting the legislative history indicates "some of the original authors of §924(c)(1) aimed the law at the choice to use a firearm during and in relation to a predicate offense."); United States v. Rentz, 777 F.3d 1105 (10th Cir.

2015)(en banc)(noting that "[f]ew statutes have proven as enigmatic as 18 U.S.C. §924(c)" and referencing the purposes set forth in Cureton and Phipps, the Tenth Circuit defaults to the rule of lenity in interpreting the statue's unit of prosecution).

In determining that Conspiracy to Commit Hobbs Act Robbery does not satisfy the force clause, § 924(c)(3)(A), the Court relied upon the reasoning of the First, Second, Third, Fourth, and Eleventh Circuits that concluded the Hobbs Act Conspiracy statute does not require proof of an overt act. Doc. 313 at 17 (citing United States v. Salahuddin, 765 F.3d 329 (3d Cir. 2014), United States v. Monserrate-Valentin, 729 F.3d 31 (1st Cir. 2013), United States v. Pistone, 177 F.3d 957 (11th Cir. 1999), United States v. Clemente, 22 F.3d 477 (2d Cir. 1994), and United States v. Ocasio, 750 F.3d 399 (4th Cir. 2014)). Those cases concluded that the conspiracy statute "does not require proof of an overt act; rather, the conspiracy is complete when the felonious agreement is reached". Id.

The Court carefully considered United States v. King, 979 F.2d 801 (10th Cir. 1992)(holding New Mexico's conspiracy offense does not require an overt act; instead, it is complete when the felonious agreement is reached), United States v. Brown, 200 F.3d 700 (10th Cir. 1999)(Section 371 conspiracy invites consideration of the underlying substantive offense because the overt act must be evaluated with reference to the object of the conspiracy whereas New Mexico's conspiracy focuses solely on the unlawful agreement and does not require an overt act), United States v. Gore, 636 F.3d 728 (5th Cir. 2011)(holding that even though the Texas conspiracy offense had an overt act requirement, one could violate the law by way of an overt act that did not amount to physical force against the person of another or the attempted or threatened use of force), and United States v. Trent, 767 F.3d 1046 (10th Cir. 2014)(reaffirming

King's conclusion that New Mexico conspiracy was not a "violent felony" because the offense did not require commission of an overt act and the conspiratorial agreement itself did not require the use or attempted use of force or a communicated threat."). These cases are instructive on the determination of whether the crime of Aiding and Abetting a Hobbs Act Robbery is a "crime of violence."

DISCUSSION

Mr. Lujan asserts that just as a conspiratorial agreement is not an "overt act", neither is the conduct contemplated by Congress in enacting the aiding and abetting statute an "overt act." In enacting 18 U.S.C. §2, Congress comprehended any form of assistance, whether it be the use of words, acts, encouragement, support, or presence, in the aid of even just one or some of the crime's phases or elements. Rosemond, 134 S. Ct. at 1246-47. Having uttered the words of encouragement and support, the aider/abetter's participation in the predicated crime has been completed.

Just as a conspiratorial agreement under the Conspiracy to Commit Hobbs Act Robbery does not require proof of an "overt act", neither does Aiding and Abetting a Hobbs Act Robbery. As to conspiracy, the Supreme Court has stated, "[w]e have consistently held that the common law understanding of conspiracy 'does not make the doing of any act other than the act of conspiring a condition of liability.'" United States v. Shabani, 513 U.S. 10, 14 (1994)(citing Nash v. United States, 229 U.S. 373, 378 (1913); referencing also Collins v. Hardyman, 341 U.S. 651, 659 (1951); and Bannon v. United States, 156 U.S. 464, 468 (1895)("At common law it was neither necessary to aver nor prove an overt act in furtherance of the conspiracy…"). In Shabani, the Supreme Court compared conspiracy under 21 U.S.C. § 846 to the general conspiracy statute, 18 U.S.C. §371, and noted that § 371 contains an explicit requirement that a conspirator "do any act to effect the object of the conspiracy." Id. Section 846 simply required: "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. §846. Following settled principles of statutory construction, the Supreme Court has consistently held "where Congress had omitted from the relevant conspiracy provision any language expressly requiring an overt act, the Court would not read such a requirement into the statute." Whitfield v. United States, 543 U.S. 209, 690-91 (2005)("Absent contrary indications, Congress intends to adopt the common law definition of statutory terms."). This settled principles applies with equal force to 18 U.S.C. § 2, aiding and abetting which "derives from (though simplifies) common-law standards for accomplice liability." Rosemond, 134 S. Ct. at 1245. The statute does not include any language expressly requiring an overt act, and this Court should not read such a requirement into the statute.

Even if this Court were to conclude that Aiding and Abetting does somehow require proof of an overt act, that element itself would not require the use or attempted use of force or a communicated threat. See Doc. 313 at 17-18 (referencing Trent, 767 F.3d at 1058, n.2). In enacting 18 U.S.C. §2, Congress comprehended any form of assistance, whether it be the use of words, acts, encouragement, support, or presence, in the aid of even just one or some of the crime's phases or elements. Rosemond, 134 S. Ct. at 1246-47 (remarking that under common-law "a person's involvement in the crime could be not merely partial but minimal too: 'The quantity of assistance was immaterial, so long as the accomplice did something to aid the crime.")(internal citations omitted). The Tenth Circuit has held to be guilty of the crime of "aiding and abetting" the defendant "does not have to have an active stake in the outcome of the crime but merely participate therein." Wyatt v. United States, 388 F.2 395, 400 (10th Cir. 1968)(defendant participated to the extent of helping his brother carry the illegally sold alcohol to the purchaser's car). Having uttered the words of encouragement and support, the aider/abetter's participation in the predicated crime has been completed. So long as the defendant has the appropriate mental state, the crime of aiding and abetting can consist of the simple words of encouragement or support with the appropriate mental state, being a "look out", or even selling goods which he knows or has reason to know will be used in an unlawful venture. See Rosemond, 134 S. Ct. at 1246-47; United States v. Teffera, 985 F.2d 1082 (D.C. Cir. 1993); Bacon v. United States, 127 F.2d 985 (10th Cir. 1942).

In light of the Tenth Circuit's analysis in King and Brown, Aiding and Abetting a Hobbs Act Robbery cannot constitute a "crime of violence" under the force clause of Section 924(c)(3).

B. Aiding and Abetting a Hobbs Act Robbery Does Not Satisfy the Residual Clause

In light of Johnson, the Court limited its analysis of whether Conspiracy to Commit Hobbs Act Robbery is a "crime of violence" pursuant to the residual clause "to the risk of force used in the course of committing the offense of conspiracy, not the risk of physical force arising after the conspiracy crime has been completed.". Doc. 313 at 23. As stated in the Court's Memorandum Opinion:

> The Tenth Circuit has expressed its view that the crime-of-violence definition in Section 924(c)(3)(B) is "*narrower*" than the definition in USSG §4B1.2, which is "congruent with the ACCA definition." The Tenth Circuit emphasized that, unlike USSG §4B1.2, analysis of Section 924(c)(3)(B)'s residual clause requires "not only focus on (1) whether an offense, by its nature, raises a substantial risk of physical force being employed, but also on (2) whether the risk of force actually *arises in the course of committing the offense*, and not merely as a probable, or even possible, result."

Doc. 313 at 22 (quoting Serafin, 562 F.3d at 1109)(emphasis in original). Mr. Lujan does not concede that this "temporal" limit to the application of Section 924(c) ameliorates the concerns of void for vagueness. However, this Court avoided the question of whether Section 924(c)'s residual clause is void for vagueness based upon its conclusion that Conspiracy to Commit Hobbs Act Robbery does not satisfy the residual clause of § 924(c)(3). Like Conspiracy to Committ Hobbs Act Robbery, the offense of Aiding and Abetting a Hobbs Act Robbery similarly fails to satisfy the residual clause of § 924(c)(3).

As argued above, Aiding and Abetting a Hobbs Act Robbery does not require proof of an overt act and as such, there is no physical force "used in the course of committing the offense." Even if the Court were to find that the act of assistance rendered by words, acts, encouragement, support, or presence is an overt act, that assistance itself does not require the use of force and does not give rise to a risk of injury. The risk that arises during the principle's commission of the crime of Hobbs Act Robbery "is remote" from the criminal action of the aider and abetter. Thus, application of the residual clause as to the aider and abetter would implicate the vagueness concerns of Johnson.

Even if this Court were to conclude that Aiding and Abetting does require proof of an overt act, that element itself would not require the use or attempted use of force or a communicated threat. See Doc. 313 at 17-18 (referencing Trent, 767 F.3d at 1058, n.2). The Tenth Circuit has held to be guilty of the crime of "aiding and abetting" the defendant "does not have to have an active stake in the outcome of the crime but merely participate therein." Wyatt v. United States, 388 F.2 395, 400 (10th Cir. 1968)(defendant participated to the extent of helping his brother carry the illegally sold alcohol to the purchaser's car). So long as the defendant has the appropriate mental state, the crime of aiding and abetting can consist of the simple words of encouragement or support with the appropriate mental state, being a "look out", or even selling goods which he knows or has reason to know will be used in an unlawful venture. United States v. Teffera, 985 F.2d 1082 (D.C. Cir. 1993); Bacon v. United States, 127 F.2d 985 (10th Cir. 1942).

In light of the Tenth Circuit's analysis in King and Brown, Aiding and Abetting a Hobbs Act Robbery cannot constitute a "crime of violence" under the force clause of Section 924(c)(3).

B. Aiding and Abetting a Hobbs Act Robbery Does Not Satisfy the Residual Clause

In light of Johnson, the Court limited its analysis of whether Conspiracy to Commit Hobbs Act Robbery is a "crime of violence" pursuant to the residual clause "to the risk of force used in the course of committing the offense of conspiracy, not the risk of physical force arising after the conspiracy crime has been completed.". Doc. 313 at 23. As stated in the Court's Memorandum Opinion:

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As argued above, Aiding and Abetting a Hobbs Act Robbery does not require proof of an overt act and as such, there is no physical force "used in the course of committing the offense." Even if the Court were to find that the act of assistance rendered by words, acts, encouragement, support, or presence is an overt act, that assistance itself does not require the use of force and does not give rise to a risk of injury. The risk that arises during the principle's commission of the crime of Hobbs Act Robbery "is remote" from the criminal action of the aider and abetter. Thus, application of the residual clause as to the aider and abetter would implicate the vagueness concerns of Johnson.

CONCLUSION

Defendant Lujan respectfully requests the Court reconsider its ruling that Hobbs Act Robbery is a "crime of violence" in light of the Supreme Court's recent decision in Voisine v. United States, 136 S. Ct. 2272 (2016) and permit the parties to present further argument as to this point at a motion hearing.

Defendant Lujan also respectfully requests the Court reconsider its application of the ruling in its Memorandum Opinion (Doc. 313) as to Mr. Lujan who is charged under 18 U.S.C. §2 as an aider and abetter and hold that Aiding and Abetting a Hobbs Act Robbery, like Conspiracy to Commit Hobbs Act Robbery, is not a crime of violence.

Respectfully submitted,

/s/ John F. Moon Samore, Esq.
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I hereby certify that a true and correct copy of the foregoing document was faxed to opposing counsel on the 21st day of July 2016.
/s/ John F. Moon Samore, Esq.